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No. 02-1624

In the Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT AND DAVID W. GORDON, SUPERINTENDENT, EGUSD, PETITIONERS,

v.

MICHAEL A. NEWDOW, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF FOR THE UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS

This case presents the question whether a school district's policy of teacher-led, voluntary recitation of the Pledge of Allegiance to the Flag violates the Establishment Clause of the First Amendment to the Constitution. Within hours of the Ninth Circuit's invalidation of the policy at issue, the Senate, by a vote of 99-0, reaffirmed its conviction that the Pledge, which has been codified in its present form since 1954, "is not an unconstitutional expression of patriotism." S. Res. 292, 107th Cong. (2002), 148 Cong. Rec. S6105-06 (daily ed. June 26, 2002). Relying upon the many public acknowledgments of our religious heritage, Congress subsequently reenacted the Pledge in its identical language, Pub. L. No. 107-293, § 2(a), 116 Stat. 2057, 2060 (2002), 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes), and reaffirmed its belief that the reference to God in the Pledge is "clearly consistent with the text and intent of the Constitution." *Id.*,

§ 1(9). The United States Senate, therefore, has a strong interest in the proper disposition of this case and appears as amicus curiae to present its view that the Pledge fully comports with the Constitution.[1]

SUMMARY OF ARGUMENT

For 111 years, our Nation's public schools have instilled the virtue of patriotism in our children through daily recitation of the Pledge of Allegiance to the Flag. The divided decision below wrongly bans that practice in the nine Western states. Reversal of that decision is warranted because it is contrary to the unbroken tradition of public acknowledgments of the role of religion in our Nation's history and because it disregards the constitutional distinction between patriotism and prayer in public school. That distinction, which is firmly entrenched in this Court's jurisprudence, leaves no doubt that public school children *may* recite the National Pledge for the same reason they *may* sing the National Anthem: such *patriotic* exercises are not *prayers*.

ARGUMENT

THE ACKNOWLEDGMENT OF THE HISTORICAL ROLE OF RELIGION IN THE PLEDGE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The two-judge majority below wrongly invalidated as a "religious act" the voluntary recitation of the Pledge of Allegiance in public school. Appendix to Petition for Writ of Certiorari of Elk Grove Unified School District and David W. Gordon, Superintendent (hereinafter "Pet. App.") at

[1] This appearance as amicus is pursuant to 2 U.S.C. § 288e(a), which authorizes the Senate to appear "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." *See* S. Res. 71, 108th Cong. (2003), 149 Cong. Rec. S3204 (daily ed. Mar. 5, 2003) (directing Senate appearance in this Court). Permission to appear as amicus is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). Pursuant to 2 U.S.C. § 288e(c), this submission presents a constitutional defense of the Pledge of Allegiance.

17. America's National Pledge is our most widely recognized statement of patriotism, unity, and devotion to country. It is recited by literally millions of children each day in our schools. As a patriotic practice that acknowledges the historical role of religion in America, voluntary recitation of the Pledge does not violate the Establishment Clause of the First Amendment to the Constitution.

A. The Pledge Is a Patriotic Exercise That Acknowledges the Historical Role of Religion in America

The Pledge is a constitutional expression of patriotism that recognizes the role of religion in our Nation's history. It was originally written by Francis Bellamy in 1892 in connection with the national public school celebration of the 400th anniversary of the discovery of America. John W. Baer, *The Pledge of Allegiance: A Centennial History 1892-1992*, at 1-2 (1992). The anniversary celebration was organized by *The Youth's Companion*, a national magazine that promoted the inclusion of patriotic education in the curriculum. Francis Bellamy, Address at The National Education Association, Saratoga Springs, New York (July 14, 1892) (transcript available at The Library of Congress, Papers of Francis Bellamy); *see also* Baer, *supra*, at 14-27.

Bellamy chose a "pledge" of "allegiance" in recognition of the vows of national allegiance recommended by President Lincoln during the Civil War. Francis Bellamy, *Story of the Origin of Pledge of Allegiance to the Flag*, 5 Rochester Alumni Rev. 71 (Feb.-Mar. 1927); *see also* Francis Bellamy, *A Twenty-Three Word National Creed: How the Most Widely-Known Patriotic Formula in America Came into Existence*, at 29-30 (undated) (manuscript available at The Library of Congress, Papers of Francis Bellamy); Baer, *supra*, at 4, 47-48. He added "and the Republic for which it stands," a phrase popularized by Senator Daniel Webster, because "the true reason for allegiance to the flag was the republic for which it stands." Bellamy, *Story of the Origin of Pledge of Allegiance to the Flag*, *supra*, at 72; *see also* Baer, *supra*, at 4, 47-48.

"One nation, indivisible" was the product of an effort "to pass on our history in review," including "the sayings of Washington, the arguments of Hamilton, the Webster-Hayne debate, the Civil War." Bellamy, *Story of the Origin of Pledge of Allegiance to the Flag*, *supra*, at 72. Bellamy devoted the remaining portion of the Pledge to the "present and future of our republic." *Id.* After asking himself what "national doctrines" served as the "basis of Americanism," he added the final phrase: "With liberty and justice for all." *Id.*

The Pledge was published as Bellamy originally drafted it: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all." *Id.*; Baer, *supra*, at 4. It was disseminated to schools throughout the nation with suggestions on its recitation. Baer, *supra*, at 3 (recommending salute of the flag during recitation, and "[t]hen still standing . . . all students will sing *America, My Country 'Tis of Thee*").

Over half of the then 120,000 public schools participated in the nation's 400th anniversary celebration. *Id.* at 50. By the 1920s, when the words "to my flag and the Republic" were replaced with "to the flag of the United States of America and to the Republic," *id.* at 57-58, the Pledge had been adopted by most public school systems. *Id.* at 59.

During the Second World War, Congress codified the Pledge among other patriotic practices, *see* Pub. L. No. 623, ch. 435, § 7, 56 Stat. 380 (1942), in order to "emphasize the existing rules and customs pertaining to the display and use of the flag." S. Rep. No. 77-1477, at 1 (1942); H.R. Rep. No. 77-2047, at 1 (1942) (setting forth "uniform guide for the proper use and display of the flag").

Then, in the midst of the Cold War, harkening back to President Lincoln's concluding call in his Gettysburg Address — that "*this nation, under God*, shall have a new birth of freedom" — Congress added the words "under God" after "Nation" to the Pledge. Pub. L. No. 396, ch. 297, 68 Stat. 249 (1954). The legislative history of the 1954 enactment demonstrates that Congress added

"under God" to the Pledge to "recognize the historical fact that our Nation was believed to have been founded 'under God.'" *Abington Sch. Dist v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring). The Senate Report recommending adoption of the amendment stated that "[o]ur forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership." S. Rep. No. 83-1287, at 2 (1954). The House Report similarly asserted that:

> Our American Government is founded on the concept of individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

H.R. Rep. No. 83-1693, at 1-2, *reprinted in* 1954 U.S.C.C.A.N. 2340.

In explaining the amendment, the House Committee on the Judiciary observed that "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." *Id.* at 2, 1954 U.S.C.C.A.N. at 2340. As manifestations of this historical tradition, both committees pointed to the Mayflower Compact, "America's first instrument of government," S. Rep. No. 83-1287, at 2, which "invoked the name of God in the first sentence," *id.*; *see also* H.R. Rep. No. 83-1693, at 2, 1954 U.S.C.C.A.N. at 2340, and the Declaration of Independence, which "no less than four times refer[red] to the existence of the Creator." *Id.*; *see also* S. Rep. No. 83-1287, at 2; Articles of Confederation, 1 U.S.C. XLVII (acknowledging "Great Governor of the world") (Article XIII).

In accordance with the admonition that "each branch of the Government must initially interpret the Constitution" in the performance of its assigned constitutional duties, *United States v. Nixon*, 418 U.S. 683, 703 (1974), the committees of both Houses expressed their considered view

that, within the meaning of this Court's precedents, the amendment was "not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 83-1693, at 3, 1954 U.S.C.C.A.N. at 2341; S. Rep. No. 83-1287, at 2. Nor did the amendment "violate the right of any person to disbelieve in God or reject the existence of God. The recognition of God in the pledge . . . does not compel any individual to make a positive affirmation in the existence of God in whom one does not believe." *Id.*

The founding documents cited by the committees contain only some of the many "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch v. Donnelly*, 465 U.S. 668. 675 (1984). At the inception of the Constitutional Convention, George Washington exhorted the delegates to "raise a standard to which the wise and the honest can repair; the event," he declared, "is in the hand of God!" Pub. L. No. 107-293, § 1(4), 116 Stat. 2057, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). Five weeks later, with Convention delegates "groping . . . in the dark to find political truth," Benjamin Franklin pondered "applying to the Father of lights to illuminate our understandings," famously recalling that, during the Revolutionary War, God had "heard, and . . . graciously answered" the "daily prayer in this room for the divine protection." 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 451 (rev. ed. 1966). The product of the Convention, our Constitution, references the Deity. *See* U.S. Const. art. VII ("Year of our Lord").

The First Congress not only acknowledged a proper role for religion in public life, but did so at the very time it drafted the Establishment Clause. Just three days before Congress sent the text of the First Amendment to the states for ratification, it authorized the appointment of legislative chaplains. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). Also on that day the House of Representatives successfully urged President Washington to institutionalize the colonial practice, which continues to date, of

celebrating a "day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2; Pub. L. No. 107-293, § 1(6), 116 Stat. 2057, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). On July 21, 1789, the very day that the First Congress approved the Establishment Clause, it passed the Northwest Ordinance, which declared: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Engel v. Vitale*, 370 U.S. 421, 443 n.9 (1962) (Douglas, J., concurring); Pub. L. No. 107-293, § 1(5), 116 Stat. 2057, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes).

The public manifestations of our Nation's religious heritage include "an unbroken history of official acknowledgment by all three branches of government." *Lynch*, 465 U.S. at 674. "Since the days of John Marshall," this Court's crier has opened each day's session by calling out: "God save the United States and this Honorable Court." *Engel*, 370 U.S. at 446 (Stewart, J., dissenting). Every President has asked for divine guidance upon assuming office. *Id.* Upon the conclusion of speeches, including the constitutionally mandated State of the Union address, Presidents commonly ask for God's blessings upon America. S. Rep. No. 83-1287, at 2. Both Houses of Congress open their daily sessions with prayer and, in recent years, recitation of the Pledge. *See* Senate Rule IV.1, *Standing Rules of the Senate*, S. Doc. No. 107-1, at 4 (2002); House Rule XIV.1, *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. No. 106-320, at 620 (2001).

Manifestations of the religious faith of our forefathers appear throughout the Nation's Capital. The Senate Chamber is inscribed with the words "In God We Trust" and the Latin phrase "Annuit Coeptis" or "God has favored our undertakings." S. Doc. No. 82-20, at 27 (1951); Pub. L. No. 107-293, § 1(10), 116 Stat. 2058, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). The Main Read-

ing Room of the Library of Congress prominently displays the Biblical quotation: "The heavens declare the Glory of God, and the firmament showeth His handiwork" (Psalms 19:1). John Y. Cole, *On These Walls* 35 (1995). Friezes on the North and South walls of this Court's chamber depict a procession of historical lawgivers including Moses and Confucius. *County of Allegheny v. ACLU*, 492 U.S. 573, 652-53 (1989) (Stevens, J., concurring in part and dissenting in part). The Tomb of the Unknown Soldier is engraved with the words: "Here rests in honored glory an American soldier known but to God." http://www.mdw.army.mil/FS-A04.htm. Multiple references to God appear in inscriptions on our national memorials. *E.g.*, http://www.monticello.org/reports/quotes/ memorial.html (Jefferson Memorial); http://www.nps.gov/linc/memorial/inscript.htm (Lincoln Memorial).

Our National Motto and Anthem, like the Pledge, also manifest our religious origins. In approving the 1954 amendment to the Pledge, Congress recognized that, pursuant to an 1864 authorization, 31 U.S.C. §5112(d)(1), "In God We Trust" had been inscribed upon "billions and billions of coins." S. Rep. No. 83-1287, at 2; H.R. Rep. No. 83-1693, at 2, 1954 U.S.C.C.A.N at 2341. In 1955, Congress added that "avowal of faith," H.R. Rep. No. 83-1693, at 2, 1954 U.S.C.C.A.N. at 2341, to our paper currency, 31 U.S.C. §5114(b), and, one year later, declared it to be our National Motto. 36 U.S.C. §302; *Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring). *The Star Spangled Banner*, designated our National Anthem in 1931, 36 U.S.C. §301, also invokes the Almighty. *Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring).

The Pledge is thus one of "countless . . . examples" of entirely legitimate official expressions in public life recognizing our religious heritage. *Id.* at 449-50 (Stewart, J., dissenting). Its recitation in school is no different from "the reading aloud of Lincoln's Gettysburg Address," *Abington*, 374 U.S. at 304 (Brennan, J., concurring), or the fact that "school children and others are officially encouraged to express love for our country by reciting historical

documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being." *Engel*, 370 U.S. at 435 n.21.[2] Given the pervasiveness of such references to God in our founding documents, by our Framers, on our government buildings, by all three branches of government, and in our National Anthem and Motto, banning the recitation of the National Pledge in our public schools as a "religious act" "contradicts our 200-year history and tradition of patriotic references to God." Pet. App. at 79 (O'Scannlain, J., dissenting from denial of reh'g en banc).

B. The Pledge Does Not Violate the Establishment Clause

Our Pledge of Allegiance to the Flag does not even remotely approach the prohibition against an unconstitutional "establishment of religion." U.S. Const. amend. I. The panel majority's conclusion to the contrary reflects a fundamental misunderstanding of the constitutional distinction between prayer and patriotism in public school.

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[2] The panel majority below erroneously insists that reading aloud from the Declaration of Independence, or singing the National Anthem, is different from reciting the Pledge because the words "I pledge" render its recitation an affirmation of the speaker's faith, and not merely that of the author or composer at issue. *See* Pet. App. at 16 (claiming that "'I Pledge' is a performative statement"). The alleged distinction, however, has no foundation in Establishment Clause jurisprudence, and, in fact, does not exist. As Judge O'Scannlain noted in dissenting from the denial of rehearing below, Pet. App. at 80, under the flawed reasoning of the panel majority, the Declaration of Independence and National Anthem "would seem to be the better candidate[s] for the chopping block than the Pledge" because they "require [the speaker] to acknowledge [a] *personal* relationship with God." *Id.*; *see* Declaration of Independence ("*We hold* these truths to be self-evident, that all men are . . . endowed by their Creator"), *reprinted at* 1 U.S.C. XLIII; *Star Spangled Banner* ("And this be *our* motto: In God is *our trust*"); *see also* U.S. Const. art. VII ("Year of *our Lord.*"); *America, My Country 'Tis of Thee* ("Protect us by thy might, Great God, *our King*"!). (Emphases added.)

Over the past 40 years, every one of this Court's school prayer decisions has emphasized the fundamentally religious nature of the challenged activity. *See Engel*, 370 U.S. at 424-25, 435 n.21 (stating at outset that it was uncontested that "nature" of state-composed prayer at issue was a "religious activity" and "has always been religious"); *Abington*, 374 U.S. at 223-24 (stating that "pervading religious character" of reading Bible and reciting Lord's Prayer constitutes a "religious exercise"); *see also id.* at 266 ("[T]he religious nature of the exercises here challenged seems plain.") (Brennan, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 58 (1985) (recognizing "wholly religious character" of Alabama statute motivated entirely by effort to advance prayer in public schools); *Lee v. Weisman*, 505 U.S. 577, 586-88, 598 (1992) (repeatedly describing graduation prayer as an "overt" "formal" and "explicit" "religious exercise"); *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 305-07 (2000) (recognizing "religious content" of "religious messages" in prayers before high school football games).

But "[n]o court, state or federal, has *ever* held . . . that [this Court's] school prayer cases apply outside a context of state-sanctioned formal religious observances." Pet. App. at 77 (O'Scannlain, J., dissenting from denial of reh'g en banc). To the contrary, this Court has repeatedly distinguished between lawful *patriotic* practices that acknowledge our religious heritage and unlawful *religious* practices that transgress the prohibition on governmental establishment of religion. In *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), this Court rejected as "extreme" the condemnation of "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies," in upholding a program permitting students to absent themselves from public school in order to receive religious training. The Court reaffirmed the point in *Engel*, stating that the "unquestioned religious exercise" at issue in that case, a public school prayer "beg[ging] th[e] blessings of Almighty God," "*b[ore] no true resemblance*" to "patriotic or ceremonial occasions" referencing the Deity. 370 U.S. at 422, 435 n.21 (emphasis added).[3]

Likewise, in *Lynch*, 465 U.S. at 676, this Court identified the Pledge and Motto among examples of lawful "reference[s] to our religious heritage" guiding the conclusion that the nativity scene at issue was constitutionally permissible. And, most recently, in *County of Allegheny*, this Court noted the "obvious distinction" between the unconstitutional religious display in that case and the "references to God in the motto and the pledge." 492 U.S. at 603.[4]

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[3] Furthermore, in *Engel*, as well as in *Abington* and *Lee*, this Court struck down morning and graduation religious exercises without expressing any disapproval of the Pledge, which was also recited by students in all three cases, *Engel*, 370 U.S. at 438 (Douglas, J., concurring); *Abington*, 374 U.S. at 208; *Lee*, 505 U.S. at 583, and which individual Justices specifically distinguished. *See* note 4, *infra*.

[4] The opinions explaining the views of 15 individual Justices in these cases also distinguish between unconstitutional religious practices and patriotic acknowledgments of our religious heritage. *See Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring) (recognizing long-standing acceptance of patriotic practices referencing God); *id.* at 449 (Stewart, J., dissenting) (same); *Abington*, 374 U.S. at 280-81, 301 (Brennan, J., concurring) (suggesting recitation of Pledge in lieu of prayer at issue and admonishing that "[a]ny attempt to impose rigid limits upon the mention of God . . . in the classroom would be fraught with dangers"); *id.* at 307-08 (Goldberg, J., concurring) (endorsing passage from Court's opinion in *Engel* distinguishing between patriotic invocations of God and "unquestioned religious exercise[s]"); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (endorsing various public references to God as "acknowledgments of religion"); *id.* at 716-17 (Brennan, J., dissenting) (identifying patriotic references to God as legitimate public "practices by which the government has long acknowledged religion"); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (recognizing propriety of public acknowledgments of God); *id.* at 88 (Burger, C.J., dissenting) (same); *County of Allegheny*, 492 U.S. at 623, 625 (O'Connor, J., concurring) (referencing lawful purposes of "government recognition and acknowledgment of the role of religion in the lives of our citizens"); *id.* at 657 (Stevens, J., concurring in part and dissenting in part) (stating that "[g]overnment policies of acknowledgment, and support for religion are an accepted part of our political and cultural heritage"); *id.* at 671-74 & n.10 (Kennedy, J., concurring in

Continued

Because of the substantial constitutional difference between prayer and patriotic references to God, voluntary recitation of the Pledge easily satisfies the tests used to detect Establishment Clause violations. The Pledge satisfies the *Lemon* test because it has the secular purposes of, *inter alia*, "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); and neither advances religion nor fosters an excessive government entanglement with it. *Lemon*, 403 U.S. at 612-13. The Pledge satisfies the endorsement test because its acknowledgment of our religious heritage is "consistent with the proposition that government may not communicate an *endorsement of religious belief*." *County of Allegheny*, 492 U.S. at 602-03 (emphasis added).

And the Pledge satisfies the coercion test because the voluntary observance of a patriotic practice does not "coerce" children to perform a "formal religious exercise." *Lee*, 505 U.S. at 587. America's public schools "are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught." *Sherman v. Community Consolidated Sch. Dist. 21*, 980 F.2d 437, 444 (7th Cir. 1992). Indeed, the "diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons." *Id.*

But "offense alone" does not violate the Constitution. *Lee*, 505 U.S. at 597. "If an Establishment Clause violation arose each time a student believed that a school

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part and dissenting in part) (distinguishing patriotic references to God from unconstitutional religious practices); *Lee*, 505 U.S. at 639 (Scalia, J., dissenting) (noting that Court's invalidation of graduation prayer did not extend to practice of reciting Pledge during graduation ceremony).

practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a 'curriculum review committee' unto himself or herself." *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994). That is precisely what has occurred here. The objection of one parent has "reduce[d] to silence" literally millions of school children "who *want* to pledge allegiance to the flag 'and to the Republic for which it stands.'" *Sherman*, 980 F.2d at 445 (upholding teacher-led voluntary recitation of the Pledge).

Accordingly, because patriotic acknowledgments of our religious heritage do not constitute an "establishment of religion," U.S. Const. amend. I, the Pledge is fully consistent with the commands of the Constitution.

CONCLUSION

The judgment below should be reversed in order to restore the teacher-led, voluntary recitation of the Pledge in our Nation's public schools.

Respectfully submitted,

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